

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ALBANESE READY MIX, INC.	:	DETERMINATION
for Revision of Determinations or for Refunds	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Periods June 1, 1977	:	
through August 31, 1977 and June 1, 1980	:	
through November 30, 1984.	:	

Petitioner, Albanese Ready Mix, Inc., Jamesville Apulia Road, Jamesville, New York 13078, filed a petition for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods June 1, 1977 through August 31, 1977 and June 1, 1980 through November 30, 1984 (File No. 803126).

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 333 East Washington Street, Syracuse, New York, on January 12, 1988 at 9:15 A.M., with all briefs to be filed by May 31, 1988. Petitioner appeared by Tisdell, Moore & Walter, Esqs. (Robert L. Tisdell, Esq., of counsel). The Audit Division appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether the Audit Division correctly determined additional sales and use taxes due from petitioner based on an examination of available books and records.

FINDINGS OF FACT

1. Petitioner, Albanese Ready Mix, Inc., was engaged in the sale of concrete.
2. On January 10, 1986, as the result of a field audit, the Audit Division issued to petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due covering the periods June 1, 1977 through August 31, 1977 and June 1, 1980 through February 28, 1983 for taxes due of \$18,350.18, plus penalty and interest of \$17,071.37, for a total amount due of \$35,421.55. A second notice was issued on the same date for the period March 1, 1983 through November 30, 1984 for taxes due of \$9,718.16, plus penalty and interest of \$4,232.99, for a total of \$13,951.15.
3. Petitioner maintained incomplete and inadequate books and records for audit. The sales invoices and purchase invoices were incomplete and there was no sales journal. Petitioner's accountant determined gross sales as recorded in the general ledger by reference to bank deposit records. There were no records showing petitioner's method of determining taxable sales. Moreover, petitioner did not file any sales tax returns for the period June 1, 1980 through August 31, 1982. The return for the period June 1, 1977 through August 31, 1977 was filed on

November 4, 1983 and therefore was included in the audit period.

4. On audit, the Audit Division reviewed available sales invoices for the entire period under audit. Those invoices on which no sales tax was charged were compared with exemption certificates on file. This procedure resulted in disallowed nontaxable sales of \$94,519.31 and tax due thereon of \$6,616.36. The Audit Division next deducted all nontaxable sales per the sales invoices from gross sales shown in the general ledger to arrive at total taxable sales of \$639,569.00. Petitioner had reported taxable sales of \$373,893.00, leaving additional taxable sales of \$265,675.00 with tax due thereon of \$18,597.32. Purchase invoices were reviewed for the period December 1, 1983 through November 30, 1984. These invoices revealed that petitioner failed to pay sales or use tax on purchases of recurring expense items amounting to \$12,989.90. Since petitioner's purchase records were incomplete, a margin of error of 2.5 percent was computed based on gross sales for the same period (\$12,989.90 divided by \$512,043.00), and was used to estimate taxable expense purchases for the rest of the audit period. The total tax due on expense purchases was \$1,728.87 (\$24,698.07 at 7%). The acquisition of fixed assets was reviewed in detail and resulted in taxes due of \$1,125.79. This amount is not in dispute.

5. Upon examination of the sales invoices, the Audit Division did not consider transportation charges for delivery of concrete as part of the taxable receipt if such charge was separately stated on the invoice to the customer. If a transportation charge was not shown on an invoice, the total receipt was deemed taxable. Additionally, the Audit Division did not consider transportation charges on those sales for which invoices were not available.

6. On January 30, 1986, petitioner filed a Tax Amnesty Application and remitted payment of \$22,671.84. The payment was allocated as follows:

<u>Notice No.</u>	<u>Tax Assessed</u>	<u>Tax Paid under Amnesty</u>	<u>Interest Paid under Amnesty</u>	<u>Total Payment</u>
S860110121C	\$18,350.18	\$12,000.00	\$6,192.71	\$18,192.71
S860110122C	9,718.16 ¹	<u>3,000.00</u>	<u>1,479.13</u>	
<u>4,479.13</u>				
	\$15,000.00 ²	\$7,671.84	\$22,671.84	

7. Petitioner obtained copies of transactions in its bank account with Lincoln First Bank, N.A. for the months of September 1983, October 1983 and November 1983. The records revealed that receipts totaling \$3,542.50 belonging to Albanese Transport, Inc., a related corporation, were deposited in petitioner's bank account. Petitioner did not request the bank's records for other periods because of the cost. Petitioner did not file amended income tax returns or sales tax returns for the misapplication of funds between related corporations.

¹The actual tax assessed on the notice was \$15,143.46. However, tax credits were due in the periods ending August 31, 1983 and May 31, 1984 totaling \$5,425.30. Also, interest credit of \$1,481.61 was due on the overpayments.

²Petitioner's amnesty application was submitted on the tax amount of \$21,906.91 (\$15,000.00 + credits of \$6,906.91).

8. The Audit Division assessed tax on sales of \$2,145.20 as part of disallowed nontaxable sales where the invoice indicated that sales tax was properly charged to the customer. As a result, the disallowed nontaxable sales were overstated by that amount.

9. Petitioner submitted four farmers' exemption certificates covering disallowed nontaxable sales of \$16,352.10. The Audit Division did not accept these certificates because the certificates state that the exemption for farmers does not apply to purchases of building materials and gives the specific example of cement as a taxable purchase on the back of the certificate. Petitioner also produced signed statements from two contractors indicating that the purchases made from petitioner amounting to \$30,994.32 during the audit period were tax exempt. These statements were rejected as they were not proper exemption certificates. All of the foregoing documents were signed in October and November 1985.

10. Counsel for the Audit Division conceded that petitioner is entitled to a credit of \$2,415.75 for an overpayment made in 1977.

SUMMARY OF PETITIONER'S POSITION

11. Petitioner argued that the audit results should be modified to reflect the following adjustments:

(a) The additional taxable sales found by comparing sales from the general ledger with sales per invoices should be reduced to give consideration to deposits of receipts belonging to Albanese Transport, Inc. Said deposits represented 4.56 percent of total deposits for the months the records were obtained from the bank. Petitioner is seeking a reduction of \$45,049.20 in additional taxable sales by applying 4.56 percent to total sales reported in the general ledger.

(b) The farmers' exemption certificates and statements referred to in Finding of Fact "9" were sufficient proof that the sales were exempt and were in fact duplicates of certificates obtained at the time of sale. Petitioner maintained that such documents were relied upon in good faith and it should not be held liable for tax on the sales totaling \$47,346.00.

(c) The margin of error found on expense purchases for 1984 (2.5%) was too diminutive to project over the balance of the audit period. Petitioner also alleged that tires were not a recurring purchase, thus further reducing the margin of error.

(d) The additional sales determined from lack of sales invoices should be apportioned as taxable and nontaxable based on the same ratio that existed for periods where sales invoices were available. Petitioner calculated that the nontaxable ratio was 39.46 percent.

(e) Although not separately stated, a charge of \$9.00 per yard of concrete should be allowed as nontaxable transportation. Petitioner estimated that such charges amounted to \$10,532.00 for the audit period.

(f) It was entitled to a bad debt credit on sales of \$1,177.65 in the quarterly period ended August 31, 1977. The credit was computed by applying 25 percent to total bad debts per general ledger of \$4,710.58 for the fiscal year ended October 30, 1977.

12. Petitioner contended that it was required to retain books and records, specifically sales invoices, purchase invoices and exemption certificates, for only three years and, therefore, many

records requested by the Audit Division were not available.

CONCLUSIONS OF LAW

A. That Tax Law § 1138(a)(1) provides that if a return is not filed or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined from such information as may be available and authorizes, where necessary, an estimate of tax due on the basis of external indices, including purchases. A person required to collect tax is mandated to keep records of every sale and the tax payable (Tax Law § 1135[a][1]), and the records must be available for examination at any time and are required to be retained for a period of three years from the due date of the return to which they relate, or the date of filing, if later, except as otherwise provided under circumstances not relevant herein (Tax Law § 1135[d]; 20 NYCRR 533.2[a][3]). Since petitioner's books and records were undeniably incomplete and inadequate for verifying taxable receipts, the Audit Division determined additional taxes due in accordance with the provisions of Tax Law § 1138(a)(1) (Matter of Licata v. Chu, 64 NY2d 873).

B. That the Audit Division reasonably calculated petitioner's tax liability. The Division performed a complete audit of available sales records. The test period used for recurring purchases was necessitated by petitioner's own failure to maintain books and records. Petitioner thus bears the burden of demonstrating by clear and convincing evidence that the method of audit or the amount of tax assessed was erroneous (Matter of Sol Wahba, Inc. v. State Tax Commission, 127 AD2d 943).

C. That the Audit Division determined unreported sales directly from petitioner's books and records. Tax Law § 1132(c) presumes all of such sales are subject to tax until the contrary is established and the burden of proving otherwise is upon petitioner (Matter of Sunny Vending v. State Tax Commission, 101 AD2d 666).

"Unless (1) a vendor shall have taken from the purchaser a certificate in such form as the tax commission may prescribe...to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax under the provisions of section eleven hundred fifteen...the sale shall be deemed a taxable sale at retail. Where such a certificate or statement has been furnished to the vendor, the burden of proving that the receipt...is not taxable hereunder shall be solely upon the customer." (Tax Law § 1132 [former (c)].)

Petitioner accepted farmers' exemption certificates in good faith. Accordingly, it was no longer petitioner's burden to prove that the sales of \$16,352.10 were taxable (see J. W. Miller Excavating Contractor, Inc. v. State Tax Commission, 131 AD2d 902; Matter of Neal Andrews, Ltd., Tax Appeals Tribunal, October 6, 1988). The statements claiming exemption from sales tax by the purchasers on sales of \$30,994.32 (Finding of Fact "9") were not proper exemption certificates and are rejected. Petitioner is not relieved of its liability for failure to collect sales tax on those transactions. To demonstrate that the sales for which invoices were not available were nontaxable, petitioner must proffer adequate documentation confirming the existence and accuracy of the allegedly exempt sales (Matter of On The Rox Liquors, Ltd. v. State Tax Commission, 124 AD2d 402). Petitioner's recordkeeping not only left no means whereby the Audit Division could identify individual exempt sales, but petitioner produced no documentary evidence to show that any of the unreported sales of \$265,675.00 were nontaxable. In the absence of exemption certificates and

given the inadequacy of petitioner's recordkeeping, the Audit Division properly treated all such sales as taxable for purposes of determining petitioner's tax liability (see ____, Matter of On The Rox Liquors, Ltd. v. State Tax Commission, supra; J. W. Miller Excavating Contractor, Inc. v. State Tax Commission, supra; Matter of Reference Library Guild, Inc., Tax Appeals Tribunal, August 4, 1988). Petitioner likewise failed to support the claim that it had regularly commingled funds of Albanese Transport, Inc., other than the amount of \$3,542.50, or that tires were not purchased annually.

D. That transportation charges for ready-mix concrete are excluded from sales and use tax when reasonable in amount and separately stated on the bill rendered to the customer (see ____, 20 NYCRR 526.5[g]). The Audit Division allowed the transportation charge in those instances where the amount was shown separately on the sales invoice. Petitioner is not entitled to any deduction from taxable receipts for transportation charges where petitioner chose not to indicate the charge on the invoice or where invoices were not available.

E. That petitioner's claim at the hearing for a bad debt credit for amounts allegedly written off as uncollectible in 1977 was not a timely application and must be denied (Tax Law § 1139[e]; 20 NYCRR 534.7[b]). However, petitioner is entitled to a credit of \$2,415.75 as indicated in Finding of Fact "10". Moreover, the tax of \$6,616.36 assessed on disallowed nontaxable sales is reduced by \$150.16 in accordance with Finding of Fact "8".

F. That the petition of Albanese Ready Mix, Inc. is granted to the extent indicated in Conclusions of Law "C" and "E"; the Audit Division is hereby directed to modify the notices of determination and demands for payment of sales and use taxes due issued January 10, 1986 with consideration given to the payment remitted with the Tax Amnesty Application; and, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
November 10, 1988

Bray _____ /s/ ____ Arthur S.
ADMINISTRATIVE LAW JUDGE